U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 November 2003

Case No.: 2003-ERA 00030

In the Matter of

STANLEY R. SWENK
Complainant

and

EXELON GENERATION CO., LLC
Respondent

RECOMMENDED DECISION AND ORDER
DISMISSING THE COMPLAINT

This proceeding arises from a complaint filed by Stanley R. Swenk (Complainant) against Exelon Generation Co., LLC (Respondent),[1] alleging that Respondent violated §211 of the Energy Reorganization Act, as amended, 42 U.S.C. §5851 (the ERA), by terminating his employment on January 8, 2003.

On October 22, 2003 Respondent filed a Motion to Dismiss and a supporting brief (Motion or ALJ 1)[2] asserting that the complaint should be dismissed because it was not timely filed. On November 4, 2003 Complainant filed a Reply to Respondent's Motion to Dismiss (Reply or ALJ 2). On November 10 Complainant filed a Supplemental Reply to Respondent's Motion to Dismiss (Supplemental Reply or ALJ 3).

Having considered the parties' arguments, the uncontested relevant facts, the law and the precedents, I find that the complaint was not timely filed and should be dismissed. Accordingly, there is no need to resolve any other issue, such as whether Complainant engaged in protected activity or whether Respondent terminated his employment due to protected activity.

I. PROCEDURAL BACKGROUND

Complainant filed the complaint against Respondent on June 4, 2003 (ALJ 4), alleging "wrongful termination" from his job with Respondent because he engaged in protected activity

[1] Respondent's name appears as amended, based on the parties' designation of Respondent in their recent filings.

[2] The abbreviation "ALJ" denotes a reference to a document in the case file so marked by the undersigned.

under the ERA. (ALJ 4 at 1) The only act of Respondent that Complainant alleges is violative of the ERA is Respondent's termination of his employment. (ALJ 2 and 3)

The complaint was investigated by the Occupational Safety and Health Administration (OSHA). On September 8, 2003 OSHA found that the complaint was without merit. On September 11, 2003 Complainant filed a timely request for a hearing before the Office of Administrative Law Judges. The hearing was initially scheduled for October 16, 2003. Subsequently, at the request of Complainant, the hearing was rescheduled for December 3, 2003.

II. FACTUAL BACKGROUND

Complainant was employed at Respondent's Limerick, Pennsylvania nuclear power generating plant as a nuclear oversight assessment team leader. (ALJ 4 at 1) In a letter to Complainant dated July 2, 2002 a manager of Respondent advised Complainant that:

> [Respondent] has conducted a review of your recent arrest…and your access has been placed on "Temporary Hold" pending the results of your court hearing on July 2, 2002. A decision will be made to reinstate your access after reviewing court documentation. Please forward all paperwork to the address below:
>
> The information must be reviewed and verified prior to returning your access…

(ALJ 5) At that time, Respondent suspended Complainant's access to the plant and, according to the complaint, he "was not allowed back into the LGS [Limerick Generation Station] nuclear facility." (ALJ 4 at 3) Thus, Respondent did not permit Complainant to work commencing on or about July 2, 2002.

A memorandum dated September 25, 2002 from Respondent to Complainant (ALJ 6) states that in a conversation on July 1, 2002 Complainant was advised that "effective immediately, your Nuclear Unescorted Access Authorization was suspended…based on trustworthiness and reliability issues. The access suspension is expected to remain at least until the resolution of this issue." The memorandum further states:

> Because Nuclear Unescorted Access Authorization is a requirement of your position in the Nuclear Oversight Organization, you are considered to have lost your employment qualifications. Therefore, the Company's policy on Loss of Employment Qualifications, a copy of which is attached, applies. If you successfully regain your access authorization within ninety (90) days, you will be permitted to remain in your current position. If you are unsuccessful in reaching your access authorization by that time and do not locate an alternative position in the Company which does not require unescorted access authorization, your employment will be terminated.

> Effective today, we are initiating the 90 day period provided in the policy to locate another position in Exelon for which you are qualified or to regain the qualifications for your current position. You may actively bid on positions you are interested in during this period. If you are successful in transferring, you will do so under the provisions of the transfer policy.
>
> If you need any assistance or have questions, please don't hesitate to ask.

In a letter to Complainant dated November 5, 2002 (ALJ 7) Respondent stated:

> This letter confirms that you are not eligible for unescorted access per the Exelon Nuclear Access Authorization Program.
>
> You have been **"DENIED"** unescorted access to all Exelon Nuclear facilities effective November 5, 2002. The reason for your denial is the willful omission of material information submitted in support of your request for unescorted access authorization. Specifically, you failed to provide accurate and timely information concerning arrests and non-traffic citations to Exelon Nuclear Security, Corporate Security, and Medical personnel. Additionally, inconsistencies were identified between your statement/accounts and official court and company timekeeping records. These issues result in a trustworthiness and reliability concern.
>
> You may appeal this decision in writing within 10 days to the address listed below. Please provide a detailed explanation of the basis for your appeal.

According to Complainant, he submitted "an appeal to [Respondent's] Security" on December 18, 2002 "as agreed" by Respondent, and that on December 23, 2002 his manager told him that "the 90 day HR clock had expired," but that he was on inactive status until the appeal was decided. Complainant asserts that "inactive status meant not being paid, but still receiving benefits." (ALJ 4 at 6)

In a letter dated January 8, 2003 Respondent's "Appeal Reviewer" advised Complainant that his appeal was denied.[3] (ALJ 8) The letter states in pertinent part:

[3] Complainant states that he received the January 8 letter on January 10, 2003. (ALJ 4 at 6)

> Based upon my review and analysis of all available, relevant information, I regret to inform you that I have concluded that the decision to deny you unescorted access must be upheld.
>
> * * *
>
> On September 25, 2002, you were advised pursuant to the Loss of Qualifications Policy that you had ninety (90) days to secure alternative employment with the Company that did not require unescorted nuclear access. That ninety day period expired on December 23, 2002. Accordingly because your request to have your unescorted access reinstated has been denied and because you have been unable to secure an alternative position with Exelon, we have no alternative but to terminate your employment effective January 8, 2003.

III. DISCUSSION

In order to grant Respondent's motion for summary decision, it must be determined that there is no genuine issue as to any material fact. 29 C.F.R. §18.40. Further, it is axiomatic that in weighing a motion for summary judgment or summary decision, the facts must be construed so that all inferences are drawn that are favorable to the nonmoving party. With one exception, it is clear that the facts set forth above are not in dispute. There is a question, however, of whether, as alleged by Complainant, Respondent provided employment "benefits" to Complainant after July 2, 2002, when his access to the plant was suspended. For purposes of evaluating Respondent's Motion, I assume that Complainant's allegation is correct.

The ERA states:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity].

42 U.S.C. §5851(a)(1). Section 5851(b)(1) contains a statute of limitations providing that an employee who believes he has been discharged or otherwise discriminated against under the ERA may file a complaint "within 180 days after such violation occurs."

As the complaint in this case was filed on June 4, 2003, any action by Respondent that occurred prior to December 6, 2002 is barred from consideration as a violation of the ERA by the 180-day statute of limitations.

As noted above, Complainant's complaint alleges that Respondent violated the ERA – and the 180-day statute of limitations commenced to run – on January 8, 2003. If so, the June 4, 2003 complaint was timely filed. On the other hand, Respondent argues that the ERA's statute of limitations began to run on November 5, 2002 when it sent Complainant the letter bearing that

date. If Respondent is correct, the complaint is not timely. The crux of the matter is the question of whether Respondent's letter of November 5, 2002 constituted a discreet act which could have been the basis for a complaint of discrimination under the ERA. More specifically, if that letter conveyed to Complainant a final and unequivocal decision of Respondent to discharge him from his job, the statute of limitations began to run at that time and the complaint is not timely.

Complainant argues:

> Although it is admitted that [Complainant] received a notice from respondent on November 5, 2002, restricting his unescorted access (see Exelon letter of November 5, 2003, attached hereto), the harm to [Complainant] did not occur until January 2003, when he was terminated.

Complainant further argues that he was considered employed by Respondent after November 5, 2002 "during which time intra company appeals were ongoing and [he] was seeking another position with the company as directed by the company…" In this regard, Complainant states that on November 22, 2002 he was told that he was "receiving a mandatory referral to the Employee Assistance Program…" (ALJ 2 at 2-3) Complainant makes an additional argument in his Supplemental Reply. Here Complainant asserts that the statute of limitations did not begin to run until December 24, 2002, because on September 25, 2002 Respondent allowed him to seek a job at the facility that did not require unescorted access or to regain his qualifications for unescorted access. (ALJ 3)

Complainant is correct in his contention that until January 8, 2003, (1) Respondent allowed him to seek employment with it that did not require unescorted access, and (2) Respondent was considering his internal appeal of the decision to deny him unescorted access to the plant. However, even in these circumstances, the judicial precedents clearly require a finding that prior to the statute of limitations cut-off date of December 6, 2002 Complainant was clearly and unequivocally advised of the decision to terminate his employment as a nuclear oversight assessment team leader.

The Supreme Court decision in Delaware State College v. Ricks, 449 U.S. 250 (1980), an employment discrimination case under Title VII and §1981 of the Civil Rights Act, is based on facts that are similar to those in the instant case. In Ricks, in February 1973 a faculty committee of Delaware State College advised Ricks, a professor, that it would recommend that he not receive a tenured position. The committee also told Ricks that it would reconsider its decision the following year. Upon reconsideration, in February 1974 the committee adhered to its earlier recommendation. On March 13, 1974 the College's board of trustees voted to deny tenure to Ricks, and Ricks immediately filed an internal grievance. Pursuant to its policy to offer someone in Ricks' status a "terminal" contract to teach one additional year, on June 26, 1974 the trustees told Ricks that he would be offered a one-year "terminal" contract that would expire on June 30, 1975. On September 12, 1974 the board of trustees notified Ricks that it had denied his grievance. The Supreme Court rejected Ricks' contention that the limitations periods did not commence to run until his one-year terminal contract expired, holding that the limitations periods began to run at the time the tenure decision was made and was initially communicated to Ricks

on June 26, 1974, while he was still actually employed. The Court made several relevant determinations. First, the Court stated:

> Mere continuity of employment without more, is insufficient to prolong the life of a cause of action for employment discrimination. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977). 449 U.S. at 256.

Ricks also rejected the argument that the date of the unfavorable tenure decision was September 12, 1974, when Ricks was notified that his grievance had been denied. The Court found that Ricks' arguments on these facts were not tenable. First, the Court stated that the tenure decision was final at the time of the board's initial decision because it then "formally rejected Ricks' tenure bid" and the board of trustees had then taken an "official position." Second, the Court held that although the board was willing to change its decision,

> [E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.

449 U.S. at 260-61 (emphasis in original), citing Electrical Workers v. Robbins & Myers, Inc., 249 U.S. 229 (1976).

In a case under the ERA, English v. Whitfield, 858 F.2d 957 (4th Cir. 1988), the Fourth Circuit relied on Ricks in holding that the statute of limitations "begins running on the date that the employee is given definite notice of the challenged employment decision, rather than the time that the effects of the decision are ultimately felt." 858 F.2d at 961. The Court rejected the contention of the employee, English, that the limitations period did not begin to run on May 15, 1984, when she received a disciplinary letter from the employer. This letter informed English that she was permanently removed from the laboratory where she had worked, barred from working in all other controlled areas, given a temporary 90-day employment assignment, but during that time was permitted to search for and bid on other positions in the facility. The letter also advised English that if she had not secured a suitable permanent position by the end of the 90 days she would be placed on layoff. English was removed from the payroll on July 30, 1984, and filed a complaint on August 24, 1984. She argued that the statute of limitations – which was only 30 days at that time – did not begin to run until she was laid off on July 30, 1984. The Court held that "final and unequivocal" notice of the adverse employment action occurred on May 15, 1984, stating:

> The only uncertainty in the [May 15, 1984] notice related to a possibility of avoidance of the consequences of the decision by means unrelated to its revocation or reexamination by the employer. If English secured other suitable employment before the end of her temporary assignment, she would avoid the ultimate, and most harsh, effect of the May 15, 1984 decision. But the possibility that effect(s) of a challenged decision might be avoided

> by such means, does not render the decision equivocal for the purposes here at issue, at least where, as here, the effect can be avoided without negating the alleged discriminatory decision itself. Even had [the employer] "re-hired" English into a new suitable position, such an act would not have erased and made non-actionable the May 15, 1984, disciplinary action.

858 F.2d at 962.

In Ross v. Florida Power & Light Company, ARB Case No. 98-044, ALJ Case No. 96-ERA 36 (March 31, 1999), arising under the ERA, the Secretary of Labor through the Administrative Review Board (ARB) reached a different conclusion than that in English. In Ross the question was whether a memorandum given to the employee, Ross, on November 3, 1995 triggered the statute of limitations. The memorandum stated that Ross's "access to the facility has been suspended." Further, the memorandum advised that Ross had 45 days "to find a job that you can perform" and if unable to do so "you will be discharged from the Company." On December 29, 1995 Ross was informed that he was "terminated at the close of business..." He filed a complaint on June 21, 1996, more than 180 days after the November 3, 1995 memorandum but less than 180 days after the December 29, 1995 termination letter. The ARB held that the November 3, 1995 memorandum did not give Ross "sufficient notice of the adverse action being taken against him" and distinguished the facts of Ross from those in English. Ross, slip op. at 3. Ross held that its "one decisive difference" from English is that in the initial notice in English the employee

> was *permanently barred* from the laboratory in which she had worked and from other secure areas of the facility. Although English was told she had 90 days within which to seek a position in the unsecured areas of the facility, there was no ambiguity about the fact that she had permanently lost her position.

Ross, slip op. at 5 (emphasis in original). In Ross, on the other hand, the ARB noted that the employee "was informed that his access was *suspended* for 45 days." Further, the ARB held:

> Until Ross was given the December 29, 1995 notice, it was reasonable for Ross to think it was still possible for him to regain access to the secured area, and thus his position."

Consequently, Ross held, the earlier notice "did not constitute final and unequivocal notice that he was being terminated." Ross, slip op. at 5 (emphasis in original).

In the instant case, the November 5, 2002 notification to Complainant is akin to the notification in English rather than that in Ross. This notice told Complainant:

> [Y]ou are not eligible for unescorted access [to the facility].

The November 5, 2002 letter also informed Complainant:

> [Y]ou have been **"DENIED"** unescorted access to all Exelon Nuclear facilities effective November 5, 2002.

This was final and unequivocal notification that Complainant was terminated from his position as nuclear oversight assessment team leader. Consequently, the statute of limitations commenced to run on November 5, 2002.

Further, contrary to Complainant's argument, the fact that on September 25, 2002 Complainant was allowed 90 days to find a job at the facility that did not require unescorted access does not delay or extend the commencement of the statute of limitations, as English instructs us. In English the Circuit Court held that the running of the statute of limitations began on the date English was informed that she was permanently barred from all controlled areas of the laboratory but had 90 days to find another position in the facility. As noted above, the Court stated:

> [T]he possibility that effect(s) of a challenged decision might be avoided [by the employee's finding other employment] does not render the decision [to bar the employee from any position in a controlled area] equivocal for the purposes here at issue, at least where, as here, the effect can be avoided without negating the alleged discriminatory decision itself.

858 F.2d at 962.

Based on the foregoing, I find that the November 5, 2002 letter constitutes clear, final and unequivocal notification to Complainant that his job as a nuclear oversight assessment team leader was terminated on that date. As discussed earlier, the fact that he was permitted to file an internal appeal does not delay the commencement of the running of the statute of limitations. Nor does the fact that Complainant filed an appeal nor any conduct of Respondent warrant a finding that there should be equitable tolling of the statute of limitations. Consequently, the June 4, 2003 complaint was not timely filed.

Accordingly, the complaint must be dismissed as untimely under the 180-day statute of limitations of the ERA, 42 U.S.C. §5851(b)(1).

ORDER

It is ORDERED that the complaint herein is dismissed.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.